

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 11 2006

Federal Communications Commission
Office of Secretary

In the Matter of)

Federal-State Joint Board on Universal Service)

CC Docket No. 96-45

BIRCH TELECOM, INC. PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's Rules,¹ Birch Telecom of the South, Inc. ("Birch") respectfully requests that the Commission grant a waiver of its Universal Service Fund ("USF") rules that direct the Universal Service Administrative Company ("USAC") to use projected first quarter 2003 revenues for the 2003 annual "true up" process. Specifically, Birch requests that it be allowed to revise its first quarter 2003 projected interstate and international end-user revenues to reflect its historical gross billed revenues for first quarter 2003 reported on its Form 499Q filed May 1, 2003, adjusted to reflect the annual uncollectible rate reported on its FCC Form 499-A filed April 1, 2004. This petition asks for the same relief recently granted by the Commission to twelve previous petitioners in its July 20, 2004², December 17, 2004³ and February 3, 2005 Orders.⁴ Like the previous twelve petitioners, Birch understated projected revenues for the first quarter of 2003, causing its USF obligation for

¹ 47 C.F.R. §1.3.

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 19 FCC Rcd 13580 (2004) ("Waiver Order I"). The subject waiver requests were made by AT&T Corp. (filed Jan. 27, 2004) (AT&T), SBC Communications, Inc. (filed Feb. 27, 2004) (SBC), and the Verizon Telephone Companies (filed Feb. 27, 2004) (Verizon).

³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 19 FCC Rcd 24049 (2004) ("Waiver Order II"). The subject waiver requests were made by ALLTEL Corporation, Inc. (filed Aug. 20, 2004), Cincinnati Bell Wireless LLC (filed Aug. 11, 2004, supplemented on Oct. 1, 2004), Cingular Wireless LLC (filed July 26, 2004), Dobson Cellular Systems, Inc. and American Cellular Corporation (filed Sept. 14, 2004), Manhattan Telecommunications Corporation and Metropolitan Telecommunications Holding Company (filed Aug. 30, 2004), Nex-Tech, Inc. (filed Oct. 12, 2004), Nextel Communications, Inc. (filed Aug. 27, 2004), and T-Mobile USA, Inc. (filed Sept. 29, 2004).

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 20 FCC Rcd 2243 (2005) ("Waiver Order III"). New Edge Network, Inc. d/b/a/ New Edge Networks requested, and was granted, the same relief requested by earlier petitioners. New Edge Network filed its petition on Aug. 23, 2004.

No. of Copies rec'd 014
List ABCDE

all of 2003 to be overstated. This relief is necessary to ensure that Birch contributes no more than its equitable share into the Universal Service Fund and is treated in a non-discriminatory manner in relation to similarly situated carriers, as required by Section 254(d) of the Communications Act of 1934, as amended (Act).

DISCUSSION

Section 1.3 provides that the Commission may waive its rules "if good cause therefore is shown."⁵ Generally, a waiver is appropriate if "special circumstances warrant deviation from the general rule and such deviation will serve the public interest."⁶ In this case, granting a waiver of the USF rules is warranted to ensure that the true-up mechanism operates as intended by the rule and statute.

In its 2002 *Interim Contribution Methodology Order*,⁷ the Commission modified its revenue-based universal service assessment system. Among other things, the Commission decided that beginning in the second quarter of 2003, carriers' universal service contributions would be based on self-provided projections of collected revenues instead of historical gross-billed revenues.⁸ In addition, in light of the change to a projected-revenue approach, the Interim Contribution Methodology Order established an annual true-up mechanism intended to ensure that carriers neither over- nor under-contributed to the USF.

⁵ 47 C.F.R. §1.3.

⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002).

⁸ See *id.*, 17 FCC Rcd at 24970.

The Commission subsequently refined the true-up process in its *Order and Second Order on Reconsideration*⁹ to allow for the transition to the new projected-revenue based methodology.¹⁰ The Commission stated:

[The Administrator] will subtract revenues projected for the first quarter of 2003 from annual revenues reported on the FCC Form 499-A to arrive at an estimate of a contributor's actual revenues for the second through fourth quarters of 2003. [The Administrator] will then compare this amount to the sum of revenues projected for the second through fourth quarters of 2003 to determine whether a refund or collection is appropriate.¹¹

In 2004 and 2005, Petitioners requested waivers of the revised true-up process. The petitioners requested that they be permitted to revise their first quarter 2003 revenue projections and substitute their actual interstate and international revenues for that quarter. They argued that unless their request was granted, they would be forced to pay true-up amounts in excess of their appropriate contributions for the second through fourth quarters of 2003. By under-projecting their first quarter 2003 revenues, their revenue amounts for the remainder of the year (i.e., those amounts used to calculate their USF contributions) became artificially and erroneously inflated.

On July 20, 2004, the Commission granted, in part, the waiver requests of AT&T, SBC and Verizon.¹² In its *Waiver Order I*, the Commission noted that Section 254 of the Act requires interstate carriers to contribute to the USF on an "equitable and nondiscriminatory basis."¹³ It further noted that consistent with section 254 of the Act, "the purpose of the annual true-up process is to ensure that interstate telecommunications providers contribute appropriate amounts

⁹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 *et al.*, *Order and Second Order on Reconsideration*, 18 FCC Rcd 4818 (2003).

¹⁰ *Id.*

¹¹ *Id.*, 18 FCC Rcd at 4825.

¹² *Waiver Order I* at ¶ 9. The Commission granted the same relief to the nine other petitioners on December 17, 2004 and February 3, 2005. See *Waiver Order II* at ¶ 5 and *Waiver Order III* at ¶ 5.

¹³ *Waiver Order I* at ¶ 7, citing 47 U.S.C. §254(d).

to the universal service mechanisms.”¹⁴ Because the revised true-up procedures led the petitioners to contribute more than their equitable share to the USF, the Commission found that they had demonstrated special circumstances warranting deviation from the rules. The Commission further held that grant of the waiver was in the public interest since first quarter 2003 revenues (as distinct from projected revenues) were not used in calculating their USF contributions.¹⁵ In waiving the true-up procedures for 2003, the Commission adopted an alternative methodology to that proposed by the petitioners to determine an appropriate contribution:

We direct the Administrator to subtract Petitioners' historical gross billed revenues for first quarter 2003 reported on their Form 499-As, when conducting true-ups for the Petitioners. Although these amounts may not precisely equal the Petitioners' collected revenues for the quarter, they will yield significantly more accurate true-up results than would their projections.¹⁶

In its two subsequent waiver orders, the Commission granted the same relief to the later petitioners that was granted in *Waiver Order I*, finding that petitioners “demonstrated that they experienced special circumstances that warrant the grant of a waiver of the Commission’s true-up procedures for 2003. Specifically, ... [p]etitioners’ actual collected revenues for first quarter 2003 exceeded their projections of collected revenues for that quarter.”¹⁷

Birch faces the same circumstances as the petitioners in the Commission's three waiver orders. Like each of the twelve previous petitioners, Birch's actual collected revenues exceeded its projections of collected revenues for first quarter 2003. As a consequence, Birch will contribute nearly \$522,453.28 more than its equitable share to the USF under the 2003 true-up procedures. Birch respectfully submits that the Commission should find that under these

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 8.

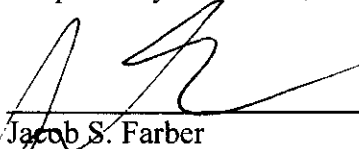
¹⁷ *Waiver Order III* at ¶ 4.

circumstances a deviation from the 2003 true-up procedures is warranted and grant of a waiver is in the public interest. Requiring Birch to contribute \$522,453.28 in excess of its fair share to the USF would be patently unfair, discriminatory, violative of section 254 of the Act, and now contrary to Commission precedent. Accordingly, Birch requests that the Commission to extend the relief granted in the prior orders to Birch. In particular, Birch requests that the Administrator be directed to apply the true-up procedure as modified by the Commission in paragraph 8 of *Waiver Order I* for the purpose of truing up Birch's 2003 USF contributions.

CONCLUSION

For the foregoing reasons, Birch respectfully requests that the Commission grant the waiver requested herein to true-up Birch's actual first quarter 2003 to the methodology adopted in the *Waiver Order*.

Respectfully submitted,



Jacob S. Farber
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006
Tel. (202) 420-2290
Fax. (202) 420-2290

Counsel for Birch Telecom of the South, Inc.

September 11, 2006